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Leading Articles

MR. JUSTICE BLACK, CHIEF JUSTICE MARSHALL, AND THE COMMERCE CLAUSE

Paul Tillett*

Mr. Justice Black's opinion in *United States v. South-Eastern Underwriters Ass'n*[1] has been referred to as "the first since Marshall's day to give the commerce clause an all-embracing yet state-power-saving construction."[2] Throughout his twenty-six years on the United States Supreme Court, Mr. Justice Black has shown himself to be an able advocate of Chief Justice Marshall's interpretation of the clause which empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." He is perhaps the first Justice since the time of Chief Justice Marshall and Mr. Justice William Johnson to fully understand Marshall's construction of this critical clause.

The commerce clause does not explain what power over commerce, if any, is left to the states. Since Chief Justice Marshall's first attempt to clarify this relationship in *Gibbons v. Ogden*,[3] the Court has adopted a series of constitutional doctrines, none of which can be regarded as having finally resolved the issues. The Justices, however, have pointed out again and again the important direct effect judicial application of this clause has upon the nation's economic and social systems and the distribution of powers in our federal system.

Mr. Justice Black has adopted a view of the commerce clause which not only gives broad scope to federal power, but also gives the states "wider authority than they have ever had."[4] In so doing, he has drawn on the major premises laid down by Marshall, while contributing his own insights into the governmental adjustments

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[1] 322 U.S. 533 (1944).

[2] MASON & BEANEY, AMERICAN CONSTITUTIONAL LAW 190 (2d ed. 1959).

[3] 22 U.S. (9 Wheat.) 1 (1824).

[4] FRANK, MR. JUSTICE BLACK, THE MAN AND HIS OPINIONS 110 (1949).

appropriate to the complexities of the modern economy. A comparison of the positions of Justices Marshall and Black will be made in the following areas:

1. What is the power granted the federal government by the commerce clause?

2. What power over commerce is retained by the states?

3. To what branch of the federal government is the commerce power given?

FEDERAL POWER UNDER THE COMMERCE CLAUSE

In *Gibbons v. Ogden,* Marshall examined the nature of the commerce power and immediately gave it a broad and an all-embracing definition. He agreed with counsel for the appellee who defined commerce in terms of the buying or the selling or the exchanging of commodities by stating that "commerce, undoubtedly, is traffic." He continued, however, to say that "it is something more—it is intercourse," and as such it "describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[5] Marshall thus not only gave commerce a broad definition, but also found positive power in the national government to regulate such commerce.

What is the extent of this power? Marshall pointed out that the power is applied to commerce "among the several states," and that "among" means "intermingled with." He stated that "commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior." Furthermore, the power to regulate, "like all others vested in congress, may be exercised to its utmost extent, and acknowledges no limitations, orher [*sic*] than are prescribed in the Constitution." Power over commerce among the states "is vested in congress as absolutely as it would be in a single government."[6] In such sweeping terms he made it possible for Congress to regulate any aspect of commercial life which affected more than one state; and, in regulating, to prescribe the "rules by which commerce is to be governed," including measures to prohibit, direct and control as well as measures to foster and promote.[7]

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[5] 22 U.S. (9 Wheat.) 1, 83 (1824).

[6] *Id.* at 85, 86.

[7] MASON & BEANEY, *op. cit. supra* note 2, at 183.

Hugo Black came to the Court in 1937. Since, he has joined all opinions giving wide scope to the federal power of regulating commerce. He foreshadowed adherence to a broad interpretation of the commerce clause during his career as a United States Senator when he restated the Marshall position that Congress' power to regulate interstate commerce is "supreme, as it would be in any single state"[8] and by his sponsorship of such legislation as the Black-Connery Bill for a thirty-hour week.

Shortly after Black's accession to the bench, in *United States v. Rock Royal Co-op.*,[9] the Justices sustained an order of the Secretary of Agriculture, issued in the New York metropolitan area, fixing minimum prices to be paid for milk to dairy farmers. The Court's opinion stated that since two-thirds of the milk produced for the New York marketing area actually moved in interstate commerce and the remaining one-third was physically and "inextricably intermingled" with the interstate milk, and all was handled in the current of interstate commerce, Congress could regulate all. Justices Black and Douglas, concurring separately, did not think that the case called for the implication that the power of Congress to enact the marketing law depended upon "the use and nature of milk"; for them it was not necessary to imply "that there is such a constitutional limitation on the power of Congress to regulate interstate commerce."[10]

Following this initial indication of the wide scope he would allow Congress in regulating commerce, Black delivered several majority opinions which expanded the meaning of commerce in order to validate federal regulation.[11] When the majority ruled that the Western Union Telegraph Company[12] was not prohibited by the act from employing child labor since it was not a "producer"

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[8] 79 CONG. REC. 758 (1935).

[9] 307 U.S. 533, 560 (1938).

[10] *Id.* at 582.

[11] In NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 326 (1939), Black, for the Court, held the National Labor Relations Act applicable to "a processor, who constitutes even a relatively small percentage of his industry's capacity, where the materials processed are moved to and from the processor by their owners through the channels of interstate commerce. . . ." And in *Walton, Adm'x v. Southern Package Corp.*, 320 U.S. 540, 542 (1944), he reasoned that a night watchman for a manufacturing plant which shipped a substantial portion of its products interstate was covered by the Fair Labor Standards Act of 1938, as one engaged in an occupation "necessary to the production" of goods for interstate commerce.

[12] Western Union Tel. Co. v. Lenroot, 323 U.S. 490 (1945).

and did not "ship" messages in interstate commerce, Black joined the dissent of Mr. Justice Murphy. They protested that semantic niceties should not require the sacrifice of social gains and saw no reason for holding that the telegraph company was not engaged in interstate commerce. In two later majority opinions, Black again asserted the full breadth of commerce power, permitting the federal government "to block navigation at one place to foster it at another"[13] and ruling that trade in news carried on among the states was likewise subject to federal control.[14]

But, for a latitudinarian interpretation of federal commerce power, no modern opinion compares with Black's explanation of the decision in *United States v. South-Eastern Underwriters Ass'n.*[15] He ruled that insurance is commerce in the constitutional sense, and thus over-turned the seventy-five year old precedent of *Paul v. Virginia.*[16] "Not only, then, may transactions be commerce though non-commercial," he noted, but "they may be commerce though illegal or sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information."[17]

Another case,[18] decided the same day, upheld the application of the National Labor Relations Act to the activities of the Polish Alliance, another insurance company. A majority of five, however, did so on grounds that differed considerably from the basis of Black's opinion in *South-Eastern Underwriters.* According to Mr. Justice Frankfurter, who wrote for the Court, the practices engaged in by the Polish Alliance were unfair labor practices "affecting commerce." Black, in a concurring opinion, objected to Frankfurter's interpretation of the facts found by the National Labor Relations Board. "Its findings," according to Black, "was that the petitioner, being 'engaged in the insurance business', was *'engaged in commerce* within the meaning of the Act.'"[19] Its labor practices were, therefore, subject to federal regulation as *commerce,* not as activities "affecting commerce." To bring the case under the rubric of those "affecting commerce," he went on, the Board should have

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[13] United States v. Commodore Park, Inc., 324 U.S. 386, 393 (1945).

[14] Associated Press v. United States, 326 U.S. 1 (1945).

[15] 322 U.S. 533 (1944).

[16] 75 U.S. (8 Wall.) 168 (1868).

[17] United States v. South-Eastern Underwriters Ass'n, 332 U.S. 533, 549-50 (1944).

[18] Polish Alliance v. NLRB, 322 U.S. 643, 648, 651 (1944).

[19] *Id.* at 651. (Emphasis added.)

found that the business of the Polish Alliance "affected interstate activities of other businesses."[20] It did not so find.

In summary, Black's position on the scope of federal power under the commerce clause reflects a recognition that to accept a definition less comprehensive than the familiar one given by Marshall "would deprive the Congress of that full power necessary to enable it to discharge its constitutional duty to govern commerce among the states"; the power is "positive" and authorizes Congress to reach affairs the individual states "are not fully capable of governing." Finally, "no commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory powers of Congress under the Commerce Clause."[21]

STATE POWER UNDER THE COMMERCE CLAUSE

Does the commerce clause foreclose state regulations? May the state regulate local commerce affecting other states in the absence of federal legislation or until the Congress exercises its supreme power? What is the extent to which, and the circumstances under which, the United States Supreme Court should invalidate state regulations when Congress has not acted? These are the perplexing questions which the Court has debated and decided, but never finally resolved.

In *Gibbons v. Ogden,* Marshall concluded that "the completely internal commerce of a state . . . may be considered as reserved for the state itself."[22] He did not agree with Mr. Justice Johnson that "the grant of this power carries with it the whole subject, leaving nothing for the state to act upon."[23]

But what of state legislation adopted to accomplish an admittedly local purpose but which, nevertheless, affects commerce among the states? It is settled that federal legislation will supersede inconsistent state regulation.[24] The more difficult cases arise when

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[20] *Id.* at 653.

[21] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 550-53 (1944).

[22] 22 U.S. (9 Wheat.) 1, 8 (1824).

[23] *Id.* at 26.

[24] Black has contributed to this doctrine. In Castle v. Hayes Freight Lines, 348 U.S. 61 (1954), the Court ruled that a state may not deny the use of state highways to federally licensed motor carriers as punishment for repeated violations of state laws. Black reasoned that the suspension of the common carrier's right to use Illinois highways would be "the

Congress chooses not to legislate from lack of concern, inability to agree, or the impossibility of legislating nationally for diverse local situations. In these circumstances, Marshall declared that the states retained the entire power of "internal police," a vast mass of regulatory authority; and, he allowed for the possibility that in the exercise of rightful state authority their laws would touch upon matters he had previously included in the commerce concept. Was this not a contradiction? By no means, for Marshall made clear that state legislation was only valid when it did not interfere with acts of Congress passed in pursuance of the Constitution. Where there was conflict, "that which is not supreme must yield to that which is supreme."[25] Consequently, state legislation may not interfere with any federal regulation of commerce. Equally, by implication, the states are free to exercise their power of "internal police," even in areas affecting commerce, until Congress acts. While it may well have been the intention of the framers of the commerce clause to avoid the "Balkanization" of the American economy, Marshall believed they placed the primary responsibility for effectuating this purpose on the Congress. With congressional inaction, the nation could indeed be "Balkanized" commercially by the states; but, an active and alert national legislature had full power to prevent it.

As a Virginian, Marshall recognized that the effective regulation of local problems belongs to the states.[26] Thus, at the same time that he derived from the commerce clause a strict limitation upon state power, he also conceded that the states retained authority to control varying local conditions in the federal society established by

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equivalent of a partial suspension of its federally granted certificate." Since, however, the federal act had required that motor carriers abide by valid state highway regulations, he added that it was incumbent upon the Interstate Commerce Commission to protect the state's interest, either on the Commission's own initiative or on complaint of the state. *Id.* at 65. Similarly, in Chicago v. Atchison, 357 U.S. 77, 89 (1957), Black held that the City of Chicago had no power to decide whether motor carriers could operate transfer service between terminals for interstate railroads. Such transfer service "is an integral part of the interstate transportation authorized and subject to regulation under the Interstate Commerce Act." The best capsule description of affirmative congressional authority is that of Mr. Justice Douglas: "Congress may, if it chooses, take unto itself all regulatory authority . . . share the task with the States, or adopt as federal policy the state scheme of regulation." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229 (1947).

[25] Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 448 (1827).

[26] FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 27 (1937). See, *e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 445-47 (1821).

the Constitution. His conception of state power was applied in *Willson v. Blackbird Creek Marsh Co.*,[27] where he upheld the validity of an act of the state of Delaware authorizing the Blackbird Creek Marsh Company to construct a dam across a navigable tidal creek flowing into the Delaware River, although the dam obstructed navigation of the creek.

Marshall emphasized that if the Congress, in executing its power to regulate commerce, had enacted positive legislation designed to control navigation in tidal creeks, the state act would have been void. The state act, however, came into conflict with no act of Congress. "We do not think," stated Marshall, "that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce *in its dormant state*, or as being in conflict with any law passed on the subject."[28]

Marshall thus preserved ultimate federal supremacy yet found that the local government's purposes of improvement of health and enhancement of property values was sufficient justification for the exercise of state authority. These aims were outside the scope of national power and Marshall implied that the Delaware statute fell outside the ban of the "dormant" commerce clause because it was not a regulation of commerce, but of "police."

Mr. Justice Thompson, in a concurring opinion to *New York v. Miln*,[29] stated that Marshall's decision suggested a "strong case to show that a power admitted to fall within the power to regulate commerce may be exercised by the states until Congress assumes the exercise." The inference would seem to be that if Congress never exercised its authority over commerce, the states would remain free to regulate their internal affairs under the police power, even if such regulations affected interstate commerce. Dormancy of federal authority, not the pragmatic test of the later case of *Cooley v. Board of Wardens*,[30] was the measure of state power. Marshall did not go so far explicitly, but his opinion placed him on the side of a variety of federalism which would leave a wide field of action to the states where the national government has

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[27] 27 U.S. (2 Pet.) 245 (1829).

[28] *Id.* at 252. (Emphasis added.)

[29] 36 U.S. (11 Pet.) 102, 149 (1837).

[30] 53 U.S. (12 How.) 299 (1851).

failed to act, but which would also give Congress broad powers when it chooses to act.

BLACK'S VIEW OF STATE POWER

After a career as a liberal senator and loyal supporter of the New Deal, Black was expected to become influential in increasing the power of the national government at the expense of the states. But it soon became apparent that he was committed to the proposition that the states retained extensive powers. Black, as John P. Frank has indicated, believes in "dynamic" government, and he thinks the Constitution grants abundant power for that type of government to both the state and the federal governments. Significantly, he has stayed outside the orbit of the stale controversy between "states rights" and "centralized power." It is not a question merely of which government shall prevail between the states and the nation. "Instead," Frank observed, "the question is which government is actually prepared at this moment to do the actual job that some group in the community thinks ought to be done."[31]

Who is to decide which group is prepared to do the job? Black's answer is clear. It is not the courts, but the legislators. On this point Black has upon many occasions differed, sometimes very strongly, with his judicial colleagues.

When Black came to the Court, he joined in the decision of *South Carolina v. Barnwell Bros.*,[32] which, in the absence of national legislation, sustained state power to regulate the length and width of vehicles using state highways whether moving in interstate commerce or moving only within the state. Judicial inquiry was to be limited to the question of whether the restrictions imposed were reasonably adapted to the ends sought, namely conserving the highways and promoting public safety. But the opinion for the Court, citing *Willson* and *Cooley*, also observed: "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce."[33] In a footnote to this observation, the Court explained:[34]

> State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the

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[31] FRANK, *op. cit. supra* note 4, at 110.

[32] 303 U.S. 177 (1937).

[33] *Id.* at 184-85.

[34] *Id.* at 184-85 n.2.

> expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted.

With this reasoning Black was in accord. The same year he vigorously dissented from a determination that the commerce clause restricts nondiscriminatory application of state taxing power.[35] An Indiana gross income tax, applied to income derived from sales in other states, was ruled unconstitutional as a "burden" on interstate commerce. Black pointed out that the tax was general, did not discriminate against interstate commerce, and fell uniformly on all gross income. It did not contravene any law of Congress. He deplored striking down the statute because of "merely possible future unfair burdens," stating:[36]

> Until Congress, in the exercise of its plenary power over interstate commerce, fixes a different policy, it would appear desirable that the States should remain free to adopt tax systems imposing uniform and non-discriminatory taxes upon interstate and intrastate business alike.

He agreed with the majority, citing *Gibbons v. Ogden,* that the power of Congress was complete. But complete power had not been exercised. Furthermore, "taxation and regulation are not synonymous; all state, county and city taxes that affect interstate commerce do not 'regulate' it in the constitutional sense." Black feared that the Court's interpretation would lead to a construction exempting enterprises engaged in interstate commerce from all state taxes on interstate receipts. This, he believed, would "impose an unfair and discriminatory burden upon local intrastate business." He concluded that "the interests of interstate commerce will best be fostered, preserved and protected—in the absence of direct regulation by the Congress—by leaving those engaged in it in the various States subject to the ordinary and non-discriminatory taxes of the States from which they receive governmental protection."[37]

He hewed to the same line in *Gwin, White & Prince, Inc. v. Henneford,*[38] where he dissented from a majority opinion which invalidated a Washington gross receipts tax, stating:[39]

> It is essential today, as at the time of adoption of the Constitution, that commerce among the States and with foreign nations

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[35] Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

[36] *Id.* at 327.

[37] *Id.* at 333.

[38] 305 U.S. 434 (1939).

[39] *Id.* at 455.

> be left free from discriminatory and retaliatory burdens imposed by the States. It is of equal importance, however, that the judicial department of our government scrupulously observe its constitutional limitations and that Congress alone should adopt a broad national policy of regulation—if otherwise valid state laws combine to hamper the free flow of commerce.

In *McCarroll v. Dixie Greyhound Lines*,[40] Black again pointed to the Court's limited responsibility for the effects of state legislation. Federal legislation, rather than judicial proceedings, would be required to accomplish appropriate uniformity in the regulation of interstate commerce:[41]

> Unconfined by the 'narrow scope of judicial proceedings' Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax . . . is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union. Diverse and interacting state laws may well have created avoidable hardships. . . . But the remedy, if any is called for, we think is within ample reach of Congress.

The fact that Black has upheld state power in all these opinions would seem to indicate that he adheres to the *Cooley* dictum, "let commerce struggle for congressional act to make it free." He would not make the dictum absolute, however. In *Best & Company v. Maxwell*,[42] he joined a unanimous decision that North Carolina could not tax out-of-state merchants where the "actual effect" of the tax was to "discriminate in favor of intrastate business."

THE ROOSEVELT COURT

In 1941, the bench experienced several personnel changes and its doctrines shifted perceptibly toward a more generous interpretation of government powers, including those of the states.[43] For a period, the Justices unanimously rejected challenges to specific instances of the exercise of state authority in areas affecting commerce. The new Chief Justice, Harlan F. Stone, made himself the Court's spokesman in such cases and usually spoke for an unanimous Court. His opinions did not evoke the separate expression of Black's views while harmony was the rule. When the Justices sustained an Arkansas statute requiring a permit for the transportation of in-

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[40] 309 U.S. 176 (1940).

[41] *Id.* at 189.

[42] 311 U.S. 454, 457 (1940).

[43] CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (7th rev. ed. 1941).

toxicating liquor through the state,[44] Mr. Justice Jackson, concurring, hinted that trouble lay ahead by voicing his concern that the Court was permitting an "unwise extension of state power over interstate commerce." "[D]efault of action by us," he stated, "will go on suffocating and retarding and Balkanizing American commerce, trade and industry."[45]

In another far-reaching decision, the Justices unanimously approved a state-sponsored monopoly of marketing for California raisins, even though California farmers grow nearly all of the raisins consumed in the United States, and sell most of the crop outside of the state.[46] A comprehensive scheme of federal agricultural regulations also existed, though it had not been applied to raisins. Chief Justice Stone held that there was no conflict between the state plan and the federal agricultural program. The Sherman Act had no application because that law made no mention of the states. The California arrangement did not interfere with interstate marketing because the regulation of raisins before they were ready for shipment out of a state was described as a local activity. As to this, Stone wrote:[47]

> When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved.

According to Stone, the judiciary was to weigh competing demands and accommodate them. And the state regulation was to be upheld because:[48]

> [U]pon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.

As the Justices were unanimous, both on the result and the reasoning, it may have seemed that they would never find an instance of state power exercised in forbidden territory. Curiously, when disagreement arose, it betrayed itself first in the insurance case, *South-*

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[44] Duckworth v. Arkansas, 314 U.S. 390 (1941).

[45] *Id.* at 400.

[46] Parker v. Brown, 317 U.S. 341 (1943).

[47] *Id.* at 362.

[48] *Id.* at 362-63.

Eastern Underwriters, where state power was discussed only incidentally. On this point, Justices Stone and Jackson, dissenting, assumed that the decision would automatically wipe out state regulation over all aspects of the insurance business. Stone seemed to think that if insurance were held to be commerce, the commerce clause of its own force would preclude state action. He pointed to the effective systems of regulating insurance which the states had developed, enabling them to solve regulatory problems of a local character "with which it would be impractical or difficult for Congress to deal through the exercise of the commerce power."[49]

Black, however, pointed out that the decision would not prevent state regulation of insurance rates so long as such regulations did not conflict with the provisions of the Sherman Act. In language which closely resembled that used by Stone in *Parker v. Brown,* he explained:[50]

> It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid.

To meet the uncertainties arising about the validity of state laws and other regulatory provisions governing insurance companies, Congress passed the McCarran Act,[51] handing back to the states the power some thought they had lost as a result of judicial decision. The Supreme Court ratified this legislative measure and suggested that coordinated state and national action could "achieve legislative consequences, particularly in the fields of regulating commerce and taxation, which, to some extent, at least, neither could accomplish in isolated exertion."[52]

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[49] 322 U.S. 533, 580 (1943).

[50] *Id.* at 548-49.

[51] McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-15 (1958).

[52] Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 439 (1946).

The hidden conflict over state powers in the commerce field became overt in *Southern Pacific Co. v. Arizona*[53] where Stone, for the majority, invoking the "balancing" concept, observed that where uniformity is judged by the Court to be "essential for the functioning of commerce," a state may not interpose its regulation. On this basis he held that a local regulation limiting interstate and intrastate freight trains to seventy cars was invalid. Black objected vigorously, stating that the determination of whether it is the interest of society for the length of trains to be governmentally regulated is a matter of public policy. "A century and a half of constitutional history and government," he wrote, "admonishes the Court to leave choice to elected representatives of the people themselves, where it properly belongs, both on democratic principles and by the requirements of efficient government."[54]

The following year, in *Morgan v. Virginia*[55] the majority invalidated a Virginia statute which prescribed racial segregation on buses. The basis for the decision was that a single, uniform rule was required to promote and protect national travel. This time Black concurred, but he could not be persuaded that the courts, rather than Congress, should regulate commerce. "I acquiesce," he said, "but only so long as the Court remains committed to the 'undue burden on commerce formula.' "[56]

JACKSON'S "NEW APPROACH"

The controversy over state power, which had been brewing within the Court since the insurance cases, came to a head after the death of Chief Justice Stone. Mr. Justice Jackson emerged as the spokesman for the Court in *H. P. Hood & Sons v. Du Mond.*[57] Jackson's majority opinion ruled that the New York Commissioner of Agriculture and Markets could not refuse a license for a milk receiving station to a Massachusetts corporation on the ground that the new station would subject others to competition and take supplies needed locally. The Constitution, through the commerce clause, established the policy of free trade among the states. Jackson declared:[58]

> Our system fostered by the Commerce Clause is that every farmer and every craftsman shall be encouraged to produce by the cer-

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[53] 325 U.S. 761 (1945).

[54] *Id.* at 789.

[55] 328 U.S. 373 (1946).

[56] *Id.* at 387-88.

[57] 336 U.S. 525 (1949).

[58] *Id.* at 539.

> tainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports. . . . Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

The policy of federal free trade emphasizes "the necessity of protecting interstate movement of goods against local burdens and repressions." He pointed to the consequences if Detroit auto manufacturers were required to satisfy Michigan's demands for cars before any could be exported beyond the state's borders.[59] Jackson's opinion did not assert an "undue burden"; it simply said that the state regulation in question was a forbidden end in an area where the Justices had recently upheld state power.[60]

Dissenting forcefully, Black criticized the Court's "new approach" because it was "inconceivable that Congress could pass uniform national legislation capable of adjustment and application to all the local phases of interstate activities that take place in the forty-eight states." The new doctrine inevitably would reconstitute an area of economic activity immune from government control:[61]

> It is always a serious thing for this Court to strike down a statewide law. It is more serious when the state law falls under a new rule which will inescapably narrow the area in which states can regulate and control local business practices found inimical to the public welfare. The gravity of striking down state regulations is immeasurably increased when it results as here in leaving a no-man's land immune from any effective regulation whatever.

Black believed that the doctrine put forth in *Duckworth v. Arkansas*[62] had been rejected by the majority and he criticized the Court for basing its decision on Mr. Justice Jackson's earlier concurring opinion. He also pointed out that Congress had "explicitly commanded cooperation" in the Agricultural Marketing Agreement Act.[63] Since both the state and the federal governments had clear interests in this area, the question, in Black's mind, turned to the role of the Court in recognizing these interests. In the Senate, Black had attacked the old Court's interpretation of the due process clause as judicial usurpation, incompatible with democracy. Mr. Justice Black continued the attack:[64]

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[59] *Id.* at 539. This consideration seemed more compelling in 1949, than in 1961 when automobiles were in good supply, to say the least.

[60] Milk Control Bd. v. Eisenberg Co., 306 U.S. 346, 353 (1939); Baldwin v. Seelig, 294 U.S. 511 (1935).

[61] H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 562 (1949).

[62] 314 U.S. 390 (1941).

[63] *Id.* at 559.

[64] *Id.* at 562-63.

> The due process clause and commerce clause have been used like Siamese twins in a never-ending stream of challenges to government regulation.
>
> Both the commerce and due process clauses serve high purposes when confined within their proper scope. But a stretching of either outside its sphere can paralyze the legislative process, rendering the people's legislative representatives impotent to perform their duty of providing appropriate rules to govern this dynamic civilization. Both clauses easily lend themselves to inordinate expansions of this Court's power at the expense of legislative power.

In *Dean Milk Co. v. City of Madison*[65] the Court once again refused to uphold state power. A city ordinance forbidding the sale of milk as pasteurized, unless pasteurized within five miles of the city, was said to constitute "unjustifiable discrimination" against interstate commerce. Black dissented. Agreeing with the state courts, Black stated that the ordinance represented a "good-faith attempt to safeguard public health by making adequate sanitation inspection possible." The fact that a health regulation "imposes a burden on trade," said Black, "does not mean that it discriminates against interstate commerce."[66]

Black's views have not yet attracted a consistent majority of his colleagues. In 1949, the Justices adopted Black's view that nondiscriminatory state taxes were valid although levied on interstate businesses. "If a new rule . . . is to be declared," he wrote, "we think Congress should do it."[67] The Court has in most other cases followed the *Cooley* rationale, which is that the commerce clause in its "dormant" state requires a consideration of "all the circumstances of the case," but leaves with the Court the task of deciding when state regulation imposes an "undue burden" on commerce.

In the long run, Black's intention in *South-Eastern Underwriters* to free state commercial regulations from federal judicial control has been frustrated. Mr. Justice Jackson has been succeeded by Mr. Justice Douglas as the opponent of state regulation and as the spokesman for a thorough-going nationalism which has risen on the bench in recent years.

One recent case, *Bibb v. Navaho Freight Lines*,[68] at first blush raises a question of whether Mr. Justice Black has not given up his

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[65] 340 U.S. 349 (1951).

[66] *Id.* at 358.

[67] Capital Greyhound Lines v. Brice, 339 U.S. 542, 547 (1950). Accord, Scripto, Inc. v. Carson, 362 U.S. 207 (1960), upholding as "nondiscriminatory" a Florida statute requiring foreign corporations to collect use taxes on Florida sales.

[68] 359 U.S. 520 (1959).

interpretation of the commerce clause. He silently acquiesced in an opinion by Mr. Justice Douglas which invalidated an Illinois law requiring trucks and trailers to use "contour and flaps." Illinois alone had this requirement, and as applied to interstate carriers it interfered with "inter-line operations." An unanimous Court declared the statute void. Mr. Justice Douglas condemned the statute on three grounds. First, it was "one of those cases—few in number —where local safety measures that are non-discriminatory place an unconstitutional burden on commerce." He continued, "the conflict between the Arkansas regulation and the Illinois regulation also suggests that this regulation of mud guards is not one of those matters admitting of diversity of treatment, according to the special requirements of local conditions" and thus a legitimate object of state regulation under the *Cooley* doctrine. Nor could the statute be saved simply because Illinois' safety standards, though unique, were so demonstrably superior to prevailing usage that "the innovating state need not be the one to give way."

Black came to the point again in 1961 and 1962 where the majority extended the logic of its own doctrine or fashioned a new formula to release business from local regulation. While it is beyond the scope of this discussion to consider the doctrine of federal preemption, that line of cases obviously has some bearing on the line developed where Congress has not legislated. The lines seemed, in the minds of the Justices, to have crossed in *Campbell v. Hussey*.[69] This was an action by tobacco auction warehousemen to restrain enforcement of the Georgia Tobacco Identification Act. The Secretary of Agriculture was authorized by statute to establish grades for tobacco as "the official standards of the United States." In his regulations, he determined that the "type" of tobacco was to be determined by characteristics which could be determined by examination of the tobacco "regardless of any factors of historical or geographical nature." Georgia regulations, on the other hand, defined "Type 14" as "that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State(s) of Georgia, Florida, and Alabama." State law required that such tobacco be identified by "a white sheet ticket." The Court, through Mr. Justice Douglas, determined that federal statutes providing for the grading of tobacco pre-empted the field and left no room for state regulation. Justices Black, Frankfurter and Harlan dissented in an opinion written by Mr. Justice Black.

The whole purpose of federal regulation, as Mr. Justice Douglas saw it, had been to establish uniform standards of classification for

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[69] 368 U.S. 297 (1961).

the protection of growers. Thus, the case did not present a question of conflict, but of federal pre-emption. When a field has been pre-empted, he reasoned, "complementary state regulation is as fatal as state regulation which conflicts with the federal scheme."

From the standpoint of the thesis developed herein, it is not surprising that Mr. Justice Black dissented; it is remarkable, however, that Justices Frankfurter and Harlan joined him. Federal regulations, the dissenters observed, established 27 types and 170 grades of tobacco. Type 14, found in the federal regulations, was close to the definition of Type 14 in the Georgia statute. Federal regulation did not require the type to be shown on the official grading tag. This may have been because type is almost invariably a geographical quality, and most tobacco is locally sold. At any rate, this was the position of the dissenters.[70]

Testimony in the lower court strongly pointed to an abuse growing up in the loop-hole in federal regulations because Type 14 had come to enjoy "the reputation of being the best tobacco produced in the United States."[71] "Growers and speculators from areas outside Georgia, Florida and Alabama have taken advantage of the general similarity and appearance of all types of flue-cured tobacco in order to sell their tobacco on Georgia markets as Type 14," declared the dissenters. This practice had led Georgia to the adoption of the controverted statute. In Florida, it led the Federal Department of Agriculture to require identification tags for all "tobacco offered for sale at auction which is determined to have been produced in Georgia, Florida, or Alabama."[72] The absence of conflict could hardly have been made more plain. The possible contradiction between this regulation and the requirement that the standards be based on criteria other than those of geography and history was resolved by noting that factors of soil and climate in Georgia, Florida and Alabama produced "characteristics" discoverable by chemical examination.[73] Thus, "the full effect" of state law was to enable buyers to distinguish federal Type 14 from all other types.

In this view of the case, the majority's decision, said the dissenters, "departs drastically from its long-continued practice of not striking down state laws as unconstitutional except where such decisions are compelled by considerations which are manifest and

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[70] *Id.* at 309, n.17.

[71] *Id.* at 304.

[72] *Id.* at 306.

[73] *Id.* at 306.

clear after careful study and analysis of the issues involved."[74] The imprecision of this language may express the price Mr. Justice Black had to pay for obtaining the agreement of Justices Frankfurter and Harlan. For himself it was perhaps enough that there was no conflict and that Congress had evidenced an intention to pre-empt the field. For his colleagues, however, the sentence just quoted may be deemed to have brought in its train the host of considerations going into the operation of balancing the interests of state and nation.

The greater part of Mr. Justice Black's dissenting opinion is given over to an analysis of the authorities cited by Mr. Justice Douglas. To support his decision, Douglas reached back to the Taft Court, when the Justices were more prone than they are today to apply mechanical concepts without analysis. In the instance cited, *Missouri Pac. R. R. v. Porter*,[75] Mr. Justice Butler found that "Congress had entered upon the regulation . . . of transportation over an interstate inland route to a seaport for delivery to a foreign vessel for ocean carriage to a nonadjacent foreign country," even though the Interstate Commerce Act and various amendments did not speak to the situation confronting the court, because Congress had given the Commission sufficient general power to control the situation, if exercised. Therefore, no state act (whether the court considered the Arkansas statute in question, contradictory or complementary to federal law does not appear) could apply. "Congress," Mr. Justice Butler wrote, "must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary."[76] It followed, therefore, that state laws "cannot be applied in coincidence with, as complementary to, or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."[77] The language of that case and perhaps the result seems to this observer to support Mr. Justice Douglas, but Mr. Justice Black, it would seem, gave the better reading to *Rice v. Sante Fe Elevator Corp.*[78] Black argued that the court would not rule that a federal statute pre-empted a field previously occupied by the states unless a purpose to pre-empt was "the clear and

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[74] *Id.* at 307.

[75] 273 U.S. 341, 345 (1927).

[76] *Id.* at 345-46.

[77] *Id.* at 346. *Cf.* Campbell v. Hussey, 368 U.S. 277, 312 (1961).

[78] 331 U.S. 218 (1947).

manifest purpose of Congress." In the *Rice* case, Mr. Justice Douglas said:[79]

> Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligation imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the federal statute. . . . It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.

In *Campbell v. Hussey*,[80] Mr. Justice Douglas did not venture upon the analysis which seemed to have been made requisite by the tests suggested in the foregoing paragraph. Black, it should be noted, voted with the majority in the *Rice* case.

The last case cited by Mr. Justice Douglas to support his position was that of *H. P. Hood & Sons v. Du Mond*, which is not a case of pre-emption at all; the idea is not conveyed in terms or by implication, since the inhibition on state power was found by Mr. Justice Jackson to flow from one of the "great silences" of the Constitution.

In the more restricted field of insurance, the implication of Black's opinion in *South-Eastern Underwriters* fared no better. The majority was unwilling to acknowledge that the case impaired the authority of earlier decisions limiting state power to tax out-of-state insurance companies. Again, it was Mr. Justice Douglas, spokesman for the nationalist majority, who expressed the view that the McCarran Act did not affect the court's decisions previous to *South-Eastern Underwriters* which had placed limitations on state power[81] and Mr. Justice Black dissented alone.

In 1963, in *Colorado Anti-Discrimination Comm'n v. Continental*

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[79] *Id.* at 230-31.

[80] 368 U.S. 277 (1961).

[81] Connecticut General [Life] Ins. Co. v. Johnson, 303 U.S. 77 (1938); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

Airlines,[82] Mr. Justice Black explained that the Illinois statute in the *Bibb* case placed a "substantial economic burden on commerce."[83] He also stated that there was no "one, sure test for deciding these burden-on-commerce cases."[84] A state commission could order the end of racial discrimination in the hiring of airline pilots by interstate carrier on the grounds that hiring was "much more localized" than transport but "more significantly" because the likelihood of conflicting federal policies was "virtually non-existent." *Continental Airlines* seems to represent a shift toward acceptance of the *Cooley* balancing-of-interests doctrine. In *Morgan v. Virginia*,[85] Mr. Justice Black announced that he would follow the *Cooley* rule as long as the majority did, even though he did not agree that the Court should make policy. After thirteen years he broke his silence in *H. P. Hood & Sons v. Du Mond*[86] and *Dean Milk*[87] because, in his judgment, the majority there "set up a new constitutional formula" more difficult for state legislation to meet than the *Cooley* rule. But in *Continental Airlines*, he was the spokesman for an unanimous bench in delineating a discretionary task for the Supreme Court:[88]

> The line separating the powers of a State from the exclusive power of Congress is not always distinctly marked; courts must examine

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[82] 83 Sup. Ct. 1022 (1963).

[83] *Id.* at 1024 n.5.

[84] *Id.* at 1025.

[85] 328 U.S. 373 (1946).

[86] 336 U.S. 525 (1949).

[87] Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[88] Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., 83 Sup. Ct. 1022, 1024 (1963). The most recent case dealing with powers of the states vis-a-vis commerce among the states is Florida Lime and Avocado Growers, Inc. v. Paul, 86 Sup. Ct. 1210 (1963). In controversy was a provision of the California agricultural code, adopted in 1925, which prohibits the sale of avocados in California containing "less than eight percent of oil, by weight." The provision was attacked as being inconsistent with federal standards established by the Secretary of Agriculture for determining the maturity of avocados, as a denial of equal protection under the fourteenth amendment, and as constituting an unreasonable burden on commerce. The Supreme Court, in a 5-4 decision announced through Mr. Justice Brennan, held that federal standards established by the Secretary of Agriculture were "minimum" standards; therefore, the California standards were not inconsistent and federal regulations had not pre-empted the field. It also took the position that the California regulation was not an irrational way to determine the maturity of avocados and therefore did not deny Florida growers equal protection. On the last point, however, Mr. Justice

closely the facts of each case to determine whether the dangers and hardships of diverse regulation justify foreclosing a State from the exercise of its traditional powers.

TO WHICH BRANCH OF THE FEDERAL GOVERNMENT IS COMMERCE POWER GIVEN?

In Mr. Justice Black's view, the states have no general power to regulate interstate commerce; but, when Congress has not acted, they may regulate subjects affecting interstate commerce except when the state statute discriminates against interstate commerce so as to give the state an unfair commercial advantage. Where Congress and the state have both legislated, national will is supreme, but it does not follow automatically that state law is invalid.

How does this position compare with that of Marshall? In *Gibbons v. Ogden,* Marshall held that under its police power a state may regulate commerce within its boundaries in the absence of conflicting federal regulation, and in the *Willson* case he upheld state power to regulate such commerce even though the state regulation affected interstate commerce. But in *Brown v. Maryland*[89] he held that a state license fee, adopted under the state's power to tax, could not be allowed to "interfere . . . with the power to regulate commerce." His decision rested on two grounds: a tax on an importer is a tax on imports, specifically prohibited to the states by the Constitution; and any penalty imposed by the state on the sale of imported articles "must be in opposition to the act of Congress which authorizes importation." In this opinion Marshall wrote ambiguously of a conflict between the exercise of powers remaining in the states and "those *vested* in Congress." But in context, his remarks suggest that federal action is required to clinch federal

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Brennan and his colleagues remanded the case to the District Court for the reception of evidence on the issue whether the application of the California statute constituted an unreasonable burden on commerce.

The dissenters, in an opinion written by Mr. Justice White and supported by Justices Black, Douglas, and Clark, thought the record showed that six percent of Florida avocados shipped to California in recent years had been excluded by the statute's operation and to them the conflict between federal and state law was "unmistakable" and "substantial." As they saw it, the federal regulatory scheme was complete and left no gap which would "warrant state action to prevent the evils of a no-man's land . . . ." *Id.* at 4431-44. As it is quite possible that at least one of the justices in the majority may agree with the dissenters that the California statute imposes a burden on commerce when and if the case comes before the Supreme Court again, the present situation is, to say the least, confusing.

[89] 25 U.S. (12 Wheat.) 266 (1827).

supremacy. State taxing authority, he commented, cannot restrain the "action" of the national government; interfere with the "administration" of federal justice; disturb the "collection" of taxes of the United States; restrain the "operation of any law which Congress may constitutionally pass"; or "derange the measures of Congress to regulate commerce."

In *Gibbons v. Ogden,* Marshall emphasized his faith in legislative bodies, referring specifically to the plenary power of Congress over commerce:[90]

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative government.

While Marshall never specifically said what the power of the Court to rule on the constitutionality of state legislation burdening interstate commerce should be, as the author of *Marbury v. Madison,*[91] *Cohens v. Virginia,*[92] *and McCulloch v. Maryland,*[93] he has often been read uncritically as an advocate of the broad view of judicial review. Cautionary statements—a refusal to enter into questions of degree and the emphasis in *Marbury* on those clauses in the Constitution which are "addressed especially to the courts"—indicate a reluctance to read each grant of power to Congress as self-executing and thus as a source of judicial authority to veto the acts of states. And as Justice Frankfurter has pointed out, perhaps Marshall rejected Webster's doctrine of "selective exclusiveness" which twenty-five years later became Supreme Court doctrine in *Cooley v. Board of Wardens* because he felt the formula would reveal "too obviously" the large powers of discretion which judges might exercise in applying the commerce clause.[94] If this inference is valid, the comparison with Black is even more pointed. Justice Black has consistently placed great faith in representative legislatures, at both state and national levels, and he has objected to the Court's confident exercise of discretion.

In *Gibbons v. Ogden,* Marshall conceded that the state's power of police extends to "everything within the territory of a state, not

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[90] 22 U.S. (9 Wheat.) 1, 86-87 (1824).

[91] 5 U.S. (1 Cranch) 87 (1803).

[92] 19 U.S. (6 Wheat.) 120 (1821).

[93] 17 U.S. (4 Wheat.) 159 (1819).

[94] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (Frankfurter, J., dissenting).

surrendered to a general government; all of which can be most advantageously exercised by the states themselves."[95] Black would put great stress on the word "advantageously," for he has been unwilling to leave areas unregulated when Congress may never adequately deal with local details. Despite burdens, he would leave the states power to deal with them. As he stated in *H. P. Hood & Sons v. Du Mond*, "[R]econciliation of state and federal interests in regulation of commerce always has been a perplexing problem. The claims of neither can be ignored if due regard be accorded the welfare of state and nation. For in the long run the welfare of each is dependent upon the welfare of both."[96] In *South-Eastern Underwriters Association*, Black commented:[97]

> [T]here is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated . . . by the states. In marking out these activities the primary test applied by the Court is . . . whether, in each case, the competing demands of the state and national interests involved can be accommodated."

Marshall, on several occasions, relied on the "spirit of the Constitution" in its interpretation. Black, like Marshall, thinks of the Constitution as giving both the national government and the states in our federal system positive and adequate powers. While Black's position on state power seems Jeffersonian, and his insistence upon Congress' plenary constitutional control over interstate commerce may seem Hamiltonian, the paradox may be explained by the Justice's understanding that most major problems of commerce and economic life are national and the Constitution provides Congress with power to deal with them; but where Congress is unable or unwilling to deal with them, the states have adequate powers to provide for the economic welfare of their own citizens. It is this latter "state-power-saving" construction which is so important today when federal legislation has come to penetrate more and more deeply into areas once occupied exclusively by the police powers of the states, and state laws have come under increasingly frequent attack.

CONCLUSION

The suggested approach is direct and clear-cut; it avoids most problems of degree by the simple expedient of permitting Congress

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[95] 22 U.S. (9 Wheat.) 1, 89 (1824).

[96] 336 U.S. 525, 550 (1949).

[97] 322 U.S. 533, 548 (1944).

the greatest possible latitude in the regulation of commercial affairs and by shifting to the Congress almost total responsibility for seeing to it that state regulations do not burden commerce among the states. So far as national regulation of commerce is concerned, the Black-Marshall formula avoids the unwieldy and inconvenient use of the phrase "activities affecting commerce." It also avoids the implication of something which may not be true: that there is a line somewhere between the internal commerce of a state and commerce among the states which the Congress is forbidden to cross.[98] In effect, the Black-Marshall formulation states that the Congress is empowered to regulate the commercial affairs of the United States in the same manner and to the same extent as if the power were vested in the legislature of a unitary national government.

Where the question is simply one of federal power, results in cases have not varied since 1937 according to the formula chosen by the majority of the justices; national power has been sustained consistently under the "activities affecting commerce" formula, just as it would have been had Black's views been adopted. In this instance, habit alone may be sufficient to account for the failure of the other Justices to adopt Black's thorough-going position. But habit alone certainly will not explain why the majority has not accepted Black's rationale for governing situations where the state's authority to affect commerce is in dispute.

This failure seems the more puzzling in the light of the difficulties the Court has experienced in finding a rational, consistent formula to explain its decisions. Why has not the Black formula commended itself to a majority of the Justices?

In the first place, it may be that the formula will not avoid all difficulties. To anyone with a concern for national commerce, the *Bibb* situation is well-nigh intolerable. But there is the distinct possibility that Congress would not undertake the task that would be thrust upon it if the Court had sustained the Illinois regulation. As Black himself has emphasized, one reason for giving the state a free hand is that Congress may never get around to formulating rules on some matters of great local concern. It is not too much to

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[98] The authors are aware that Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) has never explicitly been overruled, but believe that neither formula presently used by the court to determine Congress' power over commerce, the Black-Marshall formulation herein discussed or the matters "affecting commerce" approach, recognizes a fixed point at which federal power over commerce ends and the state's power becomes exclusive. *Cf.* CURTIS, LIONS UNDER THE THRONE 176 (1947).

say that Congress could not do the affirmative job. But equally, it might not be able to do the negative job of correcting the impact of state legislation upon interstate trade. Thus, Jackson's gloomy prediction of the "Balkanization" of the United States might very well come about by congressional default under Black's laissez-faire construction of the commerce clause.

While this is a possibility, it does not seem a strong probability. Commercial interests confined, cabined, and frustrated by state regulations would appeal to Congress for relief. Indications of the power and effectiveness of their appeals may be found in such a recent instance as the effective opposition of certain interstate industries to the general anti-preemption statute introduced and fought for in recent Congresses by Representative Howard Smith of Virginia and Senator Eastland of Mississippi. Perhaps Congress could by a general statute require the Court to do what it is doing today; that is, pass judgment on the validity of state regulations on a case by case basis.

But the fear that Congress might not perform this task, regardless of its probability, may very well be enough to inhibit a majority of Justices from handing the job over to the legislators. For the exercise of power by the Court in this sphere accords well with an institutional image which a majority of the Justices through the Court's history seem to have held. The image which seems to endure is that the Court is preeminently a *federal* instrument; that is, it exists to vindicate national authority, but also to preserve the sphere of action of the states. Above all else, it is the task of the Court to keep the nation a *federal* union. The well-known statements on this point by Mr. Justice Holmes[99] and Mr. Justice Miller's observations in the *Slaughterhouse Cases*[100] that it was the job of the Court to hold the balance between federal and state power with steady and even hand, even in the face of contrary language in the Constitution itself, indicate the strength of the federal principle among the judiciary.

In the commerce situation, the retention of ambiguous definition of the commerce power permits Congress to extend its authority while it permits the Court to preserve its own discretion against

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[99] Quoted in MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT, 77 (1961).

[100] 83 U.S. (16 Wall.) 36 (1873). See also WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 74 (1935).

the day when the central authority pushes its power over commerce to the point of threatening the existence of the states. On the other hand, a similar ambiguity permits an invisible radiation from the commerce clause to inhibit state action by allowing the Court to adopt a flexible approach to state regulation and thereby maintain (probably more effectively than Congress itself) the free flow of trade among the states in a federal union.

Finally, the adoption of the clear and precise meaning for the words in the commerce clause and the consistent application of them would deprive the Court of its discretion and, therefore, its power. Perhaps for these reasons a majority of Justices have not seen fit to follow Mr. Justice Black's doctrine on the commerce clause.